Attorney General
1275 WEST WASHINGTON
Phoenix, Arizona 85007
Robert K. Corbin

July 18, 1986

The Honorable Stephen G. Udall
Apache County Attorney
P.O. Box 637
St. Johns, Arizona 85936

Re: I86-078 (R86-072)

Dear Mr. Udall:

We have reviewed your opinion dated May 14, 1986 to Dr. Jack Raymond, Superintendent of the St. John's Unified School District, and concur with your conclusion that a school district may not legally enter into an agreement renting classroom space for one class period each day during the school year to provide religious instruction to students attending the school. However, we take this opportunity to elaborate on the analysis set out in your opinion as follows.

The Establishment Clause of the First Amendment of the United States Constitution primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697, 701 (1970); Grand Rapids School District v. Ball, ___ U.S. ___, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). The United States Supreme Court has articulated a three-part test to guide the inquiry in this area.

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation omitted]; finally, the statute must not foster "an excessive governmental entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971).

For an enactment or governmental policy to pass the test of having a secular purpose, little more is required than a reasonable legislative statement announcing a colorable secular design. Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 108, 389 A.2d 944, 954 (1978). The Supreme Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. Lynch v. Donnelly, 465 U.S. 668, 680, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604, 614 (1984). The school district might be able to articulate a valid non-religious purpose and pass the first portion of the three-pronged test, as long as fair rental value was charged for use of the premises.

However, the proposed agreement fails the second prong of the test. The crucial question under the primary effects portion of the test is not whether some benefit accrues to a religious institution as a consequence of the program, but whether its principal or primary effect advances religion. Tilton v. Richardson, 403 U.S. 672, 678, 91 S.Ct. 2091, 2096, 29 L.Ed.2d 790, 799 (1971). The government practice cannot have the effect of communicating a message of government endorsement or disapproval of religion. Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985). Here, a group of individuals wants to use school facilities on a regular basis every day of the school year to give religious instruction. Because the religious instruction is given during the school day on school grounds, there is an appearance of school district involvement and sponsorship by the school district and the state. The public school district would be communicating approval of religion over non-religion and possibly the appearance of favoring one religion over another, which is prohibited by the first amendment.

The excessive entanglement portion of the test is also violated by this proposed scheme. The objective is to prevent, as far as possible, the intrusion of either church or state into the precincts of the other. Lemon v. Kurtzman; Bell v. Little Axe Independent School District No. 70. Here, there would be a direct intrusion of religion into the precincts of the state. Students would be forced to choose between receiving religious instruction or participating in secular activities while at school, which they are required, by law, to attend. The school

would be responsible for monitoring student attendance at religious instruction, if that option was chosen. There would be day-to-day interaction between government and religion, which violates the entanglement part of the test.

The Arizona Supreme Court in Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974) held that there was no violation of art. 2, § XII of the Arizona Constitution in allowing the Board of Regents to rent school facilities to religious groups for occasional use when such use does not interfere with school activities and the rental rate charged covers the expenses involved in the use of the facilities. The court also stated, however,

> The lease to a religious group, on a permanent basis, of property on the University campus, for example, would be an entirely different matter because by the permanency of the arrangement, the prestige of the State would be placed behind a particular religion or religion generally.

Pratt, 110 Ariz. at 469, 520 P.2d at 517.

Here, the proposed arrangement is permanent in nature, and the prestige of the state would appear to be behind the religion or religion in general. Thus, the proposed rental of school facilities would violate the Establishment Clause of the First Amendment of the United States Constitution and art. 2, § XII of the Arizona Constitution.

Sincerely,

FOR BOB CORBIN
Attorney General

BC:SB:gm

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May 14, 1986

R86- 072

EDUCATION OPINION
ISSUE NO LATER TH
7-18-86

Dr. Jack Raymond
Superintendent
St. Johns Unified School District.
P. O. Box 3030
St. Johns, AZ 85936

Re: Opinion Request Concerning Rental of Classroom Space for Religious Instruction

Dear Dr. Raymond:

You have requested an opinion concerning the rental of school space for sectarian instruction. My understanding of the facts are that local individuals have requested that the school district rent, to their group, classroom space for one class period each day, during the school year, so that they may provide religious instruction. You have asked whether or not the school district may legally enter into this type of arrangement. The answer is no.

Both the Arizona and the U.S. Constitutions prohibit this type of involvement between church and state. For example, a similar program was found to be unconstitutional in Illinois, ex rel, McColloum v. Board of Education, 333 U.S. 203, 92 L.Ed 649, 68 S.Ct. 461 (1948). In that case, the local association of churches had made an arrangement with the board of education to teach pupils, whose parents signed request cards, in the school building during regular class hours one day a week, using outside teachers. The classes were conducted in regular classrooms in the school building but no student was required to attend. The court found that this practice violated the establishment clause of the U.S. Constitution in that it aided religious groups in spreading their faith by using the public school system.

The Arizona Constitution also prohibits the teaching of sectarian matters in any school. Article 11 § 7 of the Arizona Constitution provides "No sectarian instruction shall be imparted in any school or state educational institution that may be established under this constitution . . . " Also see Arizona Constitution Article 9 § 10 and Article 2 § 12 which limit the involvement of the state in sectarian matters.

The Attorney General has issued opinions indicating that school districts may only rent property to religious groups on an occasional or temporary basis. See Attorney General's Opinions I79-73, 75-9-C, 75-7-C, 75-6-C.

In summary, it would be improper for the school district to become involved in the arrangement described in your opinion request.

This opinion is being forwarded to the Attorney General for his review.

Sincerely,

RUSSELL H. BURDICK, JR.
Chief Deputy County Attorney

RHB:mp
c: Attorney General ✓